IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9433 OF 2005

The Maharashtra Rajya Sahakari Doodh Mahasangh Mydt. Mumbai Petitioner

versus

Harishchandra Vitthoba Kolpate Respondent

Mr.Ramchandra Yadav for petitioner.

Mr.H.S.s.Murthy with S.G.Mendon for respondent.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 13th January 2006

PC :

1. Heard Shri Yadav for the petitioner and Shri Murthy for respondent-original plaintiff. Shri Murthy waives service for the respondent.

2. Rule. With the consent of Shri Yadav and Shri Murthy petition is taken up for hearing and disposed of finally at this stage.

3. The petitioner is a co-operative society and it is aggrieved by an order passed by the City Civil Court, Mumbai dated 16th December 2005

rejecting an application preferred by the petitioner seeking extension of time to file a written statement.

4. It is not in dispute that Suit No.5127 of 2004 is filed by the respondent in the City Civil Court at Mumbai for a declaration that the agreement between the petitioner (original defendant) and respondent is valid and subsisting and the termination thereof on 27th October 2004 is illegal and bad in law.

5. It appears from the record that after this suit was filed a Notice of Motion was taken out for interlocutory reliefs. That Notice of Motion was contested by the petitioner. The Notice of Motion was dismissed by the Trial Court and an appeal challenging that order was also dismissed by this Court. At the hearing of the Notice of Motion, the petitioner waived service of the writ of summons.

6. Shri Yadav appearing for the petitioner submits that it was his duty to file a written statement after the service of writ of summons was waived and at least within a period of three months from the date thereof. He submits that

the written statement was not filed and it appears that on 4th July 2005 the Court passed an order that the suit will proceed ex-parte. Shri Yadav submits that the order dated 4th July 2005 was passed in the absence of the petitioner and the respondent's advocate was directed to inform the petitioner's advocate about the decision of the Court. He submits that thereafter the matter was placed for recording of evidence of the respondent's witnesses from time to time. However, the petitioner's advocate's name was not shown on board on some occasions and therefore he could not remain present. However, when the matter was placed before the Trial Court on 16th December 2005, an application was made in writing (Exhibit-A) in which a statement was made that only after receipt of advocate's letter that the petitioner became aware that the suit is kept on 15th December 2005. The explanation for not filing written statement is that there was a change of management. In these circumstances, it was submitted that the written statement may be permitted to be placed on record.

7. Shri Yadav submits that this application has been erroneously rejected by the learned Judge by observing that when no written statement order

was passed on 4th July 2005 and the suit has proceeded thereafter, then as per the mandate of Code of Civil Procedure (amended in 2002) the petitioner was obliged to file written statement within the period stipulated by law. He submits that this view of the learned Judge is erroneous inasmuch as there is enough discretion in the Court and it can enlarge the period provided the cause is made out for doing so. He, therefore, submits that the order of the learned Judge should be set aside.

8. Shri Murthy, on the other hand, contends that the petitioner has been negligent in the matter. It is not as if time was not granted. He submits that the Roznama in this case is clear and in that behalf he invites my attention to paragraphs 4 and 5 of the impugned order.

9. After hearing learned counsel appearing for parties and perusing the Roznama of the relevant dates as well as impugned order, in my view, while it is true that the petitioner’s advocate has not bothered to follow up the matter in the Court below and has allowed the Court to pass an order to proceed ex-parte as early as on 4th July 2005, in my view, the version of the petitioner

was before the Court at an interlocutory stage. That version was on merits of the case. That apart, it appears that the Court below decided to proceed ex-parte as early as on 4th July 2005. The order of 4th July 2005 was passed in the absence of the petitioner and it’s advocates. On 12th August 2005 the matter was adjourned for want of time to 13th September 2005. From 13th September 2005 it appears that the Court was on leave and the matter stood adjourned to 7th November 2005. On 7th November 2005 even the plaintiff and his advocate were absent. The petitioner and it’s advocate were also absent. It appears that the suit was adjourned for dismissal on 21st November 2005. On 21st November 2005, the Court, in the absence of petitioner and it’s advocate, passed an order that the matter will proceed ex-parte on 16th December 2005 and notice was directed to be issued of the order directing ex-parte proceeding.

10. In these circumstances, on 16th December 2005 when the petitioner appeared and sought time to file written statement, in view of the peculiar fact situation, the Court should have considered the application sympathetically. The

Court should not have rejected it merely because it had decided to proceed ex-parte in July 2005. Since the matter had not proceeded substantially thereafter, interest of justice could have been subserved, if application of petitioner had been considered on merit and a last chance was given to them to defend the suit. It is well settled that there is enough discretion in the Court. It is not obliged to proceed ex-parte in the absence of written statement. A valuable right to defend a proceeding has to be balanced with the plaintiff's right to obtain an ex-parte judgement. In the peculiar facts and circumstances set out above, in my view, the petitioners application deserved to be granted. It is accordingly granted.

11. Shri Yadav states that the written statement is affirmed on 22nd December 2005 and would be filed in the Court on 17th January 2006. If it is so tendered, the learned Judge is directed to take the same on the file and proceed with the matter thereafter in accordance with law. However, since the petitioner has taken considerable time in filing the written statement, the respondent-plaintiff deserves to be compensated and accordingly the written

statement is directed to be taken on record on payment of costs of Rs.5,000/- (Rs.Five thousand only). Payment of costs is condition precedent.

12. The Trial Court to proceed with the matter and dispose of the suit as expeditiously as possible. Rule is made absolute in the above terms.

(S.C.DHARMADHIKARI, J.)